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21 **UNITED STATES DISTRICT COURT**
22 **NORTHERN DISTRICT OF CALIFORNIA, SAN JOSE DIVISION**

23 MICHAEL FORD, NOE GAMBOA, and
24 MADISON COPELAND, individually and on
25 behalf of all others similarly situated,

26 Plaintiffs,

27 vs.

28 [24]7 .AI, INC., a California Corporation,

Defendant.

CASE NO. 5:18-CV-02770-BLF

CLASS ACTION

**NOTICE OF MOTION AND MOTION
FOR PRELIMINARY APPROVAL OF
CLASS ACTION SETTLEMENT;
MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT THEREOF**

Date: August 5, 2021

Time: 9:00 a.m.

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3 TO ALL PARTIES AND THEIR COUNSEL OF RECORD:

4 PLEASE TAKE NOTICE that on August 5, 2021, at 9:00 a.m., or as soon thereafter as the
5 matter may be heard in the Courtroom of the Honorable Beth Labson Freeman, United States
6 District Court, Northern District of California, San Jose Division, 280 South 1st Street, San Jose,
7 CA 95113, Plaintiffs Michael Ford, Noe Gamboa, and Madison Copeland (“Plaintiffs¹”) will and
8 hereby do move the Court, pursuant to Federal Rule of Civil Procedure 23(e), for the entry of an
9 Order:

- 10 1. Preliminarily approving the Settlement Agreement between Plaintiffs and Defendant
11 [24]7.AI, Inc., (“Defendant”);
12 2. Approving the form, manner, and content of the notice for the proposed settlement
13 to the Class;
14 3. Appointing Epiq Systems, Inc. as the Claims Administrator;
15 4. Appointing Melissa S. Weiner of Pearson, Simon & Warshaw, LLP and Michael F.
16 Ram of Morgan & Morgan Complex Litigation Group as Class Counsel; and
17 5. Setting a Fairness Hearing date and briefing schedule for final approval of the
18 Settlement and consideration of Class Counsel’s fee application.
19

20 The grounds for this motion are that the proposed settlement is within the necessary range
21 of reasonableness to justify granting preliminary approval pursuant to Rule 23(e). This motion is
22 based upon this Notice of Motion and Motion for Preliminary Approval of Class Action Settlement,
23

24 _____
25 ¹ Unless otherwise indicated, capitalized terms shall have the same meaning as they do in the
26 Settlement Agreement. References to “§ __” are to sections in the Settlement Agreement, submitted
27 as Exhibit 1 and the Declaration of Michael F. Ram In Support of Motion for Preliminary
28 Approval (the “Ram Decl.”) and all Settlement Agreement Exhibits are referred to as “Exh A, B.”

1 the Memorandum of Points and Authorities, the accompanying Declarations of Melisa S. Weiner,
2 Michael F. Ram and Jessie Mahn, the pleading and papers on file in this action, and such
3 oral argument and documentary evidence as may be presented at the hearing on this motion.
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MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

After three years of hard-fought litigation, Plaintiffs and Defendant have reached an agreement to resolve this action on a class-wide basis. The Settlement was reached after not only aggressive litigation, which included an appeal to the Ninth Circuit, but also extensive, well-informed, arm's-length negotiations, including mediation with an experienced neutral, Rodney A. Max.

Under the terms of the proposed settlement, Defendant will provide meaningful monetary reimbursement for out-of-pocket losses, up to \$2,000 per Valid Claim, monetary relief for lost time spent up to three hours for undocumented time, and an additional two hours (for five hours total) for documented time spent dealing with the Data Incident. Additionally, Defendant has confirmed it has taken significant measures related to its information security practices. §2.3. As part of the Settlement, Defendant has agreed to pay all costs of notice and claims administration. Plaintiffs will apply to this Court for a payment of attorneys' fees and expenses not to exceed \$450,000, and service awards of \$2,000 per Plaintiff.

The proposed settlement is fair, reasonable, adequate and meets all requirements for preliminary approval, including the *Procedural Guidance for Class Action Settlements* ("Procedural Guidance"). Absent a settlement, the Class would be subject to the risk of uncertainty at trial and on appeal and would incur additional expenses through further litigation. Plaintiffs respectfully request that the Court grant their Motion for Preliminary Approval of Class Action Settlement ("Motion") and preliminarily approve the Settlement.

II. BACKGROUND

A. Plaintiffs' Claims

On September 26, 2020, Plaintiffs Michael Ford, Noe Gamboa and Madison Copeland filed a Second Consolidated Amended Class Action Complaint ("SAC"). The SAC alleges that Defendant failed to secure and safeguard customers' payment card data ("PCD") and other personally identifiable information ("PII") that Defendant collected while Plaintiffs and Class and Subclass members shopped on Best Buy's, Sears', and other companies' websites or chatted with

1 customer service on Best Buy's, Sears', and other companies' websites in the Fall of 2017. (Dkt.
 2 No. 101). Plaintiffs asserted four causes of action: negligence, violation of California's Unfair
 3 Competition Law, Cal. Bus. & Prof. Code §§ 17200 *et seq.* (the "UCL"); breach of confidence; and
 4 violation of Illinois Consumer Fraud and Deceptive Business Practices Act, 815 Ill. Comp. Stat.
 5 Ann. §§ 505, *et seq. Id.*

6 **B. Procedural History and Summary of the Litigation**

7 The parties vigorously litigated this case. The first complaint in this case was filed on May
 8 10, 2018, asserting claims arising out of a Data Incident that affected customers of Best Buy, Delta
 9 Airlines, and Sears, all of which had contracted with Defendant, which offered sales and service-
 10 oriented software, as well as voice and chat agent services for sales support. Plaintiffs alleged that
 11 the Data Incident was a result of Defendant's inadequate security measures despite being aware of
 12 the increase in cyberattacks. Plaintiffs further alleged that, in addition to Defendant's failures to
 13 prevent the Data Incident, Defendant also failed to disclose the Data Incident for approximately six
 14 months, despite detecting and allegedly remedying the breach in October 2017.

15 On August 1, 2018, (Dkt. 45), Delta Airlines moved to dismiss the case, transfer or stay the
 16 matter under the first-to-file rule because a substantially similar case—*Pica, et al. v. Delta Air Lines,*
 17 *Inc., et al.*, Case No. 2:18-cv-02876-MWF-E (C.D. Cal.) ("Pica")—had been filed in the Central
 18 District of California one month prior and was more procedurally advanced. On August 15, 2018,
 19 Defendant joined Delta Airlines' motion. Plaintiffs opposed the motion. (Dkt. 50). After briefing on
 20 the issues, this Court issued a ruling indicating it was inclined to transfer the matter rather than
 21 dismiss it. However, it was unclear to the Court whether the Central District of California was the
 22 proper District to transfer the matter to under the first-to-file rule. The Court then directed the Parties
 23 to submit supplemental briefings on the issues. (Dkt. 87). The Parties subsequently, due to the *Pica*
 24 Court dismissing the *Pica* matter with prejudice, filed a Stipulation to Set Briefing Schedule,
 25 proposing to submit 5-page supplemental briefs addressing the venue issue and the effect of the *Pica*
 26 dismissal. (Dkt. 88). The Court denied the Parties' request and granted Defendant's motion to
 27 dismiss the case under the first-to-file rule. (Dkt. 89).

28 Plaintiffs appealed the Court's ruling to the Ninth Circuit Court of Appeals. The Appeals

1 Court vacated the Court's decision and remanded pending resolution of *Pica*. (Dkt. 90). On
 2 September 26, 2020, Plaintiffs filed a Second Consolidated Amended Complaint ("SAC"), (Dkt.
 3 101). Defendant filed a Motion to dismiss the SAC on November 13, 2020. (Dkt. 109). The Parties
 4 subsequently filed responsive and reply motions. On April 9, 2021, the Parties jointly informed the
 5 Court that the Parties reached a Settlement in the case.

6 **III. THE TERMS OF THE PROPOSED SETTLEMENT**

7 The Settlement Agreement defines the Settlement Class, describes the Parties' agreed upon
 8 exchange of consideration, and proposes a plan for disseminating notice and administering claims
 9 for the Settlement Class Members.

10 **A. Certification of the Settlement Class**

11 Under the Settlement Agreement, the Parties agree to certification of a nationwide
 12 Settlement Class for settlement purposes, defined as follows:
 13

14 all persons who were mailed notification by Best Buy of the Data Incident
 15 perpetrated on [24]7 in the fall of 2017. The Settlement Class specifically excludes:
 16 (i) [24]7, Best Buy, and their respective officers and directors; (ii) all Settlement
 17 Class Members who timely and validly request exclusion from the Settlement Class;
 18 (iii) the Judge assigned to evaluate the fairness of this settlement; and (iv) any other
 Person found by a court of competent jurisdiction to be guilty under criminal law of
 initiating, causing, aiding or abetting the criminal activity occurrence of the Data
 Incident or who pleads *nolo contendere* to any such charge.

19 §1.24.

20 **B. Relief for the Settlement Class Members**

21 All Settlement Class Members who submit a Valid Claim are eligible for the following out-
 22 of-pocket expenses, not to exceed \$2,000 per Settlement Class member, that were incurred as a
 23 result of the Data Incident: (i) unreimbursed bank fees; (ii) unreimbursed card reissuance fees; (iii)
 24 unreimbursed overdraft fees; (iv) unreimbursed charges related to unavailability of funds; (v)
 25 unreimbursed late fees; (vi) unreimbursed over-limit fees; (vii) long distance telephone charges;
 26 (viii) cell minutes (if charged by minute), Internet usage charges (if charged by the minute or by the
 27 amount of data usage and incurred solely as a result of the Data Incident), and text messages (if
 28

1 charged by the message and incurred solely as a result of the Data Incident); (ix) unreimbursed
 2 charges from banks or credit card companies; (x) interest on payday loans due to card cancellation
 3 or due to over-limit situation incurred solely as a result of the Data Incident; (xi) costs of credit
 4 report(s) purchased by Settlement Class Members between September 27, 2017 and the date of the
 5 Claims Deadline (with affirmative statement by Settlement Class member that it was purchased
 6 primarily because of the Data Incident); (xii) costs associated with freezing and/or unfreezing credit
 7 reports with any credit reporting agency (with affirmative statement by Settlement Class member
 8 that the charge was incurred primarily because of the Data Incident); and (xii) costs of fraud
 9 resolution services incurred by Settlement Class Members between September 27, 2017 and the date
 10 the Claims Deadline (with affirmative statement by Settlement Class member that the cost was
 11 incurred primarily because of the Data Incident and not for other purposes, and with proof of
 12 purchase). To receive reimbursement for any of the above-referenced out-of-pocket expenses,
 13 Settlement Class Members must submit documentation. §2.1.
 14

15
 16 Settlement Class Members are also eligible to receive up to three hours of lost time spent
 17 dealing with the Data Incident (calculated at the rate of \$20 per hour), as long as one full hour was
 18 spent and the Settlement Class Member attests on the Claim Form to the time spent. *Id.* To receive
 19 up to three hours in lost time, Settlement Class members need not submit any documentation of that
 20 lost time, but Settlement Class Members must attest that the time claimed was spent dealing with
 21 the Data Incident. *Id.* Settlement Class Members may claim an additional two hours of lost time if
 22 they can provide adequate documentation of those additional two hours spent dealing with the Data
 23 Incident. *Id.*

24 C. Attorneys' Fees, Expenses, and Service Awards

25 Within the time period established by the Court, and no later than twenty-five (25) after the
 26 Notice Date and thirty-five days (35) prior to the Objection and Opt-Out Date, Class Counsel will
 27 file a Motion for Approval of attorneys' fees, expenses, class representative service awards to be
 28 paid by Defendant, which shall be included on the Settlement Website. Class Counsel will apply for

1 an award of attorneys' fees and expenses not to exceed \$450,000. §7.2. In recognition of their time,
 2 costs, and effort in the litigation, including their undertaking of related risks and burdens, Defendant
 3 has agreed not to oppose an application to the Court for a service award in the amount of \$2,000 to
 4 each of the Plaintiffs. §7.3. Plaintiffs have the option to file a Supplemental Motion for Final
 5 Approval and/or a Response to Objections no later than seven (7) days prior to the Final Fairness
 6 Hearing.

7 **D. Claims Administrator and Claims Administration**

8 The Settlement Agreement seeks appointment of Epiq Systems, Inc ("Claims Administrator"
 9 or "Epiq") as the Claims Administrator to effectuate and administer the notice as described in the
 10 Settlement Agreement, § 3.2, and process the Claim Forms and pay Valid Claims per the Agreement.
 11 *See generally* §2. Before selecting Epiq, the Parties obtained and reviewed another claims
 12 administrator bid. Ram Decl. ¶ 38. Epiq was ultimately selected based on its reputation for excellent
 13 work and breadth of experience administering other similar consumer class actions. Ram Decl. ¶
 14 39.

15 The Claims Administrator will use both a Long Notice (long form) and Short Notice (short
 16 form) to disseminate notice of the Settlement Agreement to the Settlement Class Members. §3.1.a-
 17 g; Exs. A and B. The Long Notice and Short Notice are designed to provide notice of the full terms
 18 of the Settlement Agreement and include summary of the parties' respective litigation positions; the
 19 general terms of the settlement set forth in the Settlement Agreement; instructions for how to object
 20 to or opt-out of the settlement; the process and instructions for making claims to the extent
 21 contemplated; and the date, time and place of the Final Fairness Hearing. §3.1.f.

22 The notice program was created by the Claims Administrator and includes: (1) Notice of
 23 Settlement and Claim Form sent by electronic mail if an e-mail address is available or in the
 24 alternative mailed through the through the United States Postal Service, to all members of the
 25 Settlement Class who are identifiable to the Claims Administrator²; (2) creation of a Settlement
 26 _____

27 ² Defendant shall serve a subpoena on Best Buy to obtain the name, email address (where
 28 available) and physical address of each Settlement Class Member that Best Buy possesses.

1 Website to be updates with information made available to the Settlement Class Members; and (3) a
 2 toll-free telephone number through which Settlement Class Members can obtain additional
 3 information about the settlement.

4 **IV. ARGUMENT**

5 **A. The Court Should Preliminarily Approve the Settlement**

6 Class Counsel have worked persistently to reach a fair, reasonable, and adequate settlement.
 7 Plaintiffs and Class Counsel believe their claims are strong and are optimistic about obtaining class
 8 certification and succeeding on the merits. However, significant expense and risk attend the
 9 continued prosecution of the claims through trial and any appeals. In negotiating and evaluating the
 10 Settlement, Plaintiffs and Class Counsel have taken these costs and uncertainties into account, as
 11 well as the risks and delays inherent in complex class action litigation. Class Counsel believe the
 12 proposed Settlement provides significant relief to the Settlement Class Members and is fair,
 13 reasonable, adequate, and in the best interests of the Settlement Class.
 14

15 **B. Legal Standard**

16 Rule 23(e) requires court approval of any settlement of claims of a settlement class. The
 17 Ninth Circuit maintains a “strong judicial policy that favors settlements, particularly where complex
 18 class action litigation is concerned.” *Class Plaintiffs v. City of Seattle*, 955 F.2d 1268, 1276 (9th
 19 Cir. 1992); *see also Churchill Vill., L.L.C. v. Gen. Elec.*, 361 F.3d 566, 576 (9th Cir. 2004); *In re*
 20 *Syncor ERISA Litig.*, 516 F.3d 1095, 1101 (9th Cir. 2008).

21 When parties in class action litigation reach a Settlement Agreement (like that in this action)
 22 prior to class certification, “courts must peruse the proposed compromise to ratify both the propriety
 23 of the certification and the fairness of the settlement.” *Staton v. Boeing Co.*, 327 F.3d 938, 952 (9th
 24 Cir. 2003). First, the court must assess whether a Rule 23 class exists. *Id.* (citing *Amchem Prods.*
 25 *Inc. v. Windsor*, 521 U.S. 591, 620 (1997)). Second, the court must determine whether the proposed
 26 Settlement “is fundamentally fair, adequate, and reasonable.” *Id.* In doing this, the court “evaluate[s]
 27 the terms of the settlement to determine whether they are within a range of possible judicial
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approval.” *Wright v. Linkus Enter., Inc.*, 259 F.R.D. 468, 472 (E.D. Cal. 2009). Courts do not need to “specifically weigh[] the merits of the class’s case against the settlement amount and quantif[y] the expected value of fully litigating the matter.” *Rodriguez v. W. Publ’g Corp.*, 563 F.3d 948, 965 (9th Cir. 2009). Rather, courts put an emphasis on whether the settlement is “the product of an arms-length, non-collusive, negotiated resolution [].” *Id.*

Preliminary approval should be granted where “the proposed settlement appears to be the product of serious, informed, non-collusive negotiations, . . . has no obvious deficiencies, . . . does not improperly grant preferential treatment to class representatives or segments of the class, and . . . falls within the range of possible approval.” *Vasquez v. Coast Valley Roofing, Inc.*, 670 F. Supp. 2d 1114, 1125 (E.D. Cal. 2009). The Settlement satisfies all of these requirements and justifies publishing and sending notice of the Settlement to Class Members and scheduling final approval proceedings. *See In re Tableware Antitrust Litig.*, 484 F. Supp. 2d 1078, 1079-80 (N.D. Cal. 2007); 4 Newberg on Class Actions § 13:15 (5th ed.). “[T]he very essence of a settlement is compromise, ‘a yielding of absolutes and an abandoning of highest hopes.’” *Officers for Justice v. Civil Serv. Comm’n*, 688 F.2d 615, 624 (9th Cir. 1982).

The approval of a proposed class action settlement “is committed to the sound discretion of the trial judge.” *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1026 (9th Cir. 1998). In exercising this discretion, however, courts must give “proper deference to the private consensual decision of the parties” because:

the court’s intrusion upon what is otherwise a private consensual agreement negotiated between the parties to a lawsuit must be limited to the extent necessary to reach a reasoned judgment that the agreement is not the product of fraud or overreaching by, or collusion between, the negotiating parties, and the settlement, taken as whole, is fair, reasonable and adequate to all concerned.

Id. at 1027.

In making a preliminary determination of the fairness, reasonableness, and adequacy of a class action settlement, the trial court must balance several factors, including:

(1) the strength of the plaintiffs’ case; (2) the risk, expense, complexity, and likely duration of further litigation; (3) the risk of maintaining class action status throughout the trial; (4) the amount offered in settlement; (5) the extent of discovery completed and the stage of the proceedings; (6) the experience and views of counsel; (7) the presence of a governmental participant; and (8) the reaction of the class members to

1 the proposed settlement.

2 *Churchill Vill.*, 361 F.3d at 575; *see, also, Torrissi v. Tucson Elec. Power Co.*, 8 F.3d 1370, 1375
3 (9th Cir. 1993). Preliminary approval does not require the trial court to answer the ultimate question
4 of whether a proposed settlement is fair, reasonable and adequate. That final determination is made
5 only after class notice has been sent and Class Members have the opportunity to object to, or opt
6 out of, the settlement. *See* Moore’s Fed. Prac. § 23.165 (3d ed. 2009).

7 **C. Conditional Class Certification is Warranted**

8 This Settlement is conditioned upon approval of the Settlement Class. The “Settlement
9 Class” definition, for settlement purposes only is:

10 all persons who were mailed notification by Best Buy of the Data Incident
11 perpetrated on [24]7 in the fall of 2017.

12 Excluded from the Settlement Class are: (i) [24]7, Best Buy, and their respective officers and
13 directors; (ii) all Settlement Class Members who timely and validly request exclusion from the
14 Settlement Class; (iii) the Judge assigned to evaluate the fairness of this settlement; and (iv) any
15 other Person found by a court of competent jurisdiction to be guilty under criminal law of initiating,
16 causing, aiding or abetting the criminal activity occurrence of the Data Incident or who pleads *nolo*
17 *contendere* to any such charge.

18 Class certification under Rule 23 is a two-step process. First, the Plaintiffs “must satisfy
19 each of the four requirements of Rule 23(a)—numerosity, commonality, typicality, and adequacy—
20 and at least one of the requirements of Rule 23(b).” *Briseno v. ConAgra Foods, Inc.*, 844 F.3d 1121,
21 1124 (9th Cir. 2017). “Class certification is proper only if the trial court [] conclude[s], after a
22 “rigorous analysis,” that Rule 23(a) has been satisfied.” *Wang v. Chinese Daily News, Inc.*, 737 F.3d
23 538, 542–43 (9th Cir. 2013) (citing *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 351 (2011)). As
24 mentioned above, besides satisfying Rule 23 (a) Plaintiffs must also satisfy at least one requirement
25 of Rule 23(b). Below, Plaintiffs will demonstrate that Rule 23(b)(3) is satisfied in that, “questions
26 of law or fact common to Class Members predominate over any question affecting only individual
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1 members, and that a class action is superior to other available methods for fairly and efficiently
 2 adjudicating the controversy.” Fed. R. Civ. P. 23(b)(3).

3 **1. Plaintiffs Satisfy Rule 23(a) Requirements**

4 **(a) Numerosity**

5 The court must first decide whether “the class is so numerous that joinder of all members is
 6 impracticable.” Fed. R. Civ. P. 23(a)(1). “Impracticable” does not mean impossible, only that it
 7 would be difficult or inconvenient to join all members of the class. *See Harris v. Palm Springs*
 8 *Alpine Estates, Inc.*, 329 F.2d 909, 913-14 (9th Cir. 1964). Courts have found joinder impracticable
 9 in cases involving as few as forty class members. *See Ikonen v. Hartz Mountain Corp.*, 122 F.R.D.
 10 258, 262 (S.D. Cal. 1988) (“As a general rule, ...classes of 40 or more are numerous enough.”).
 11 Here, information from Defendant shows that, at least, 396,116 individuals’ data was potentially
 12 impacted in the 2017 Cyberattack. Rule 23(a) numerosity requirement is satisfied in this class action.

13 **(b) Commonality**

14 Fed. R. Civ. P. 23(a)(2) requires that “there are questions of law or fact common to the class.”
 15 For the purposes of Rule 23(a)(2), “even a single question will do.” *Wal-Mart*, 564 U.S. at 359.
 16 Commonality is satisfied where the claims of all class members “depend upon a common contention
 17 ... of such a nature that it is capable of classwide resolution—which means that determination of its
 18 truth or falsity will resolve an issue that is central to the validity of each one of the claims in one
 19 stroke.” *Id.* at 350. “What matters to class certification ... is not the raising of common ‘questions’—
 20 even in droves—but rather, the capacity of a class-wide proceeding to generate common *answers* apt
 21 to drive the resolution of the litigation.” *Id.* (emphasis in original).
 22
 23
 24

25 The proposed Settlement Class in this action satisfies the Rule 23(a)(2) commonality
 26 requirement. For example, it is undisputed that, at a minimum, there is a common issue of whether
 27 Defendant exercised due care in collecting, storing, and safeguarding the Settlement Class
 28

1 Members' data.³ (*See* Dkt. 101, ¶¶100-01).

2 (c) **Typicality**

3 Fed. R. Civ. P. 23(a)(3) requires that “the claims or defenses of the representative parties are
4 typical of the claims or defenses of the class.” “The purpose of the typicality requirement is to assure
5 that the interest of the named representative aligns with the interests of the class.” *Ebarle v. Lifelock,*
6 *Inc.*, No. 15-CV-00258-HSG, 2016 WL 234364, at *4 (N.D. Cal. Jan. 20, 2016)(quoting *Hanon v.*
7 *Dataproducts Corp.*, 976 F.2d 497, 508 (9th Cir. 1992)).

8 Plaintiffs are typical of the Settlement Class they seek to represent. As with the Settlement
9 Class, Plaintiffs' PCD and other PII were compromised or disclosed without their authorization.
10 Plaintiffs' claims arise from Defendant's conduct and, therefore, Plaintiffs are typical to the
11 Settlement Class.

12 (d) **Adequacy**

13 Fed. R. Civ. P. 23(a)(4) requires Plaintiffs “fairly and adequately protect the interests of the
14 class.” Plaintiffs must demonstrate that they and their counsel(s) do not have any conflicts of interest
15 with other members of the Settlement Class and also, that Plaintiffs and their counsel will prosecute
16 the action vigorously on behalf of the class. *See Ebarle*, 2016 WL 234364, at *4.

17 Here, Plaintiffs have no interests that are antagonistic to the interests of the Settlement Class
18 in that they are equally interested that their PCD and PII are adequately protected from unauthorized
19 disclosures. Additionally, Class Counsel do not have any conflicts with the Settlement Class and
20 have substantial experience in litigating, trying, and successfully resolving class action litigation.
21 Plaintiffs and Class Counsel have prosecuted this class action vigorously, and successfully, on
22 behalf of the Settlement Class, and will continue to do so.

23
24
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26
27
28 ³ A more comprehensive list of question of law or fact common to the class is outlined in the Second Consolidated Amended Class Action Complaint, ECF 101, ¶¶ 100-01.

1 2. **Plaintiffs Satisfy At Least One Requirement of Rule**
2 **23(b)**

3 Besides satisfying Rule 23(a), Plaintiffs also satisfy at least one of subsection of Rule 23(b),
4 specifically Fed. R. Civ. P. 23(b)(3), thus conditional certification is warranted. Fed. R. Civ. P.
5 23(b)(3) provides that a class action can be maintained where “the court finds that the questions of
6 law or fact common to class members predominate over any questions affecting only individual
7 members, and that a class action is superior to other available methods for fairly and efficiently
8 adjudicating the controversy.” *Noll v. eBay, Inc.*, 309 F.R.D. 593, 604 (N.D. Cal. 2015).

9 “Predominance exists when common questions present a significant aspect of the case and
10 they can be resolved for all members of the class in a single adjudication.” *Id.* In this case, every
11 member of the Settlement Class alleged that their PCD and other PII were compromised or disclosed
12 without their authorization. This common question or issue can be resolved for all members of the
13 Settlement Class in a single adjudication. The common question arises out of Defendant’s conduct.

14 Besides the predominance requirement, Plaintiffs must also meet the superiority
15 requirement. Plaintiffs “must show that a class action is the most efficient and effective means of
16 resolving the controversy.” *Id.* “[T]he class action mechanism is superior to individual actions in
17 consumer cases with thousands of members as Rule 23(b)(3) was designed for situations such as
18 this ... in which the potential recovery is too slight to support individual suits, but injury is substantial
19 in the aggregate.” *Id.*

20 The class action mechanism is superior to individual actions given the large number of
21 individuals involved in the Data Incident. The mechanism is also superior when the weighed against
22 the expense and burden of individual litigations.

23 D. **The Proposed Settlement Should Be Preliminarily Approved**

24 1. **The Proposed Settlement is the Product of an Arm’s-**
25 **Length, Non-Collusive, Negotiated Resolution**

26 The Settlement “was negotiated at arm’s length.” Fed. R. Civ. P. 23(e)(2)(B). In negotiating
27 the settlement, the parties’ experienced counsel benefitted from the guidance and assistance of an
28 experienced neutral mediator, Rodney A. Max, reinforcing the procedural fairness of the Settlement.

1 *See Satchell v. Fed. Express Corp.*, No. C 03 2878 SI, 2007 WL 1114010, at *4 (N.D. Cal. Apr. 13,
 2 2007)(“The assistance of an experienced mediator in the settlement process confirms that the
 3 settlement is non-collusive.”); *see also Ellis v. Naval Air Rework Facility*, 87 F.R.D. 15, 18 (N.D.
 4 Cal. 1980) (“the fact that experienced counsel involved in the case approved the settlement after
 5 hard-fought negotiations is entitled to considerable weight.”). Further, courts have recognized that
 6 agreements based on a mediator’s proposal/involvements demonstrate non-collusive conduct. *See*,
 7 *e.g., Ebarle*, 2016 WL 234364, at *6 (finding that acceptance of a mediator’s proposal following
 8 mediation “strongly suggests the absence of collusion or bad faith”).

9 Here, the negotiation included a mediation before Rodney A. Max, an experienced mediator
 10 on complex class action matters, by Zoom Video Conference on March 10, 2021. Prior to the
 11 mediation, the Parties submitted mediations statements with corresponding exhibits outlining their
 12 respective positions in the litigation. Ram Decl. ¶ 15.

13 2. Investigation And Discovery Completed Support the 14 Settlement

15 Throughout the three-year period of this class action, the parties carefully investigated the
 16 claims and conducted discovery prior to reaching a resolution. *See In re Mego Fin. Corp. Securities*
 17 *Litig.*, 213 F.3d 454, 459 (9th Cir. 2000) (“significant investigation, discovery and research”
 18 supported “district court’s conclusion that the Plaintiffs had sufficient information to make an
 19 informed decision”). Plaintiffs were provided with Defendant’s detailed and comprehensive
 20 responses to the Connecticut, Delaware, Florida, Indiana, Kansas, New York, and Pennsylvania
 21 Attorneys General, as well as three post-forensic investigation reports for Defendant and the clients
 22 Defendant serviced (*e.g.*, Best Buy) to understand how the Data Breach occurred and what business
 23 practice changes Defendant has enacted to mitigate future breaches. Ram Decl. ¶ 25. The efforts of
 24 the parties prior to settlement provided Plaintiffs and Defendant with a clear view of the strengths
 25 and weaknesses of their respective positions. *In re Portal Software, Inc. Sec. Litig.*, No. C-03-5138
 26 VRW, 2007 WL 4171201, at *4 (N.D. Cal. Nov. 26, 2007).

27 The Settlement reflects years of work, including pre-filing investigations, legal research and
 28 analysis of the Settlement Class claims, filing amended complaints/consolidated complaints;

1 opposition motions and appeals work. Ram Decl. ¶ 5-15. As a result, the fair and true value of the
 2 Settlement Class claims was well-known prior to mediation and settlement. Ram Decl. ¶ 15. Taking
 3 all this into account, the Parties had sufficient bases to make informed decisions about the relative
 4 merits of the case and the fairness of the Settlement. Ram Decl. ¶ 21-24.

5 **3. The Procedural Guidance for Class Action Settlement**
 6 **Factors Are Satisfied**

7 **(a) Guidance 1: Differences, Range, and Plan Allocation**

8 **(i) Procedural Guidance ¶ 1.a – Differences in the Proposed**
 9 **Settlement Class and the SAC**

10 The parties request that the Court certify the following Settlement Class:

11 All persons who were mailed notification by Best Buy of the Data Incident
 12 perpetrated on [24]7 in the fall of 2017.

13 Defendant has identified approximately 396,116 individuals that fall within the Settlement
 14 Class. The Settlement Class definition is narrower than the proposed class in the SAC which
 15 includes:

16 All persons who use Defendant's electronic customer service platform or who
 17 shopped on Best Buy's, Sears', or any other of Defendant's clients' websites or
 18 mobile applications, and whose Customer Data was compromised as a result of the
 19 Data Breach.

20 The proposed Settlement Class is different than the one in the SAC and relates to
 21 Defendant's Best Buy consumers only because all three Plaintiffs in the SAC were direct customers
 22 of Best Buy and that is where they allege their PCD and PII were taken and provided to Defendant.
 23 The other potential class members not part of Settlement Class consist of customers who shopped
 24 on Sears' or any other of Defendant's clients' websites or mobile applications customers. Delta
 25 disclosed it was impacted by the Data Breach; however, the Ninth Circuit upheld Delta and
 26 Defendant's dismissal based on preemption under the Airline Deregulation Act, *Pica v. Delta Air*
 27 *Lines, Inc.*, 812 Fed. Appx. 591 (9th Cir. July 16, 2020), and therefore, Plaintiffs agreed not to
 28 include in this litigation consumers whose involvement with this litigation arises from a relationship

1 with Delta. (Dkt. 95). Finally, there were additional third parties who were potentially affected by
 2 the Data Breach, but elected not to participate in the Settlement, which compelled a smaller proposed
 3 class, but also resulted in a more focused release, so only Best Buy and the consumers with which
 4 Best Buy had a relationship are in the scope of the Settlement, and any other third parties are not
 5 otherwise bound by the Settlement.

6
 7 (ii) Procedural Guidance ¶ 1.c - Differences in Claims to be
Released and Claims in SAC

8 The SAC brought four claims for relief which included Negligence, Violation of California's
 9 Unfair Competition Law, Breach of Confidence, and Violation of Illinois Consumer Fraud and
 10 Deceptive Business Practices Act. Plaintiffs and Settlement Class Members will be releasing claims
 11 related to these claims and other Unknown Claims as outlined in sections 1.20 and 1.28 in the
 12 Settlement Agreement.

13
 14 (iii) Procedural Guidance ¶ 1.e – Expected Recovery for the
Settlement Class

15 Due to the uncertainties of litigation and the risk and cost associated with litigation, the
 16 potential for recovery up to \$2,000 per Settlement Class Member for out-of-pocket losses is
 17 significant. Additionally, up to five hours of recovery for lost time fairly compensates consumers
 18 for time spent dealing with the Data Incident. *See, e.g., Roe v. Frito-Lay, Inc.*, No. 14-CV-00751-
 19 HSG, 2016 WL 4154850, at *7 (N.D. Cal. Aug. 5, 2016) (noting “the risks and costs associated with
 20 class action litigation weigh strongly in favor of settlement” where “Plaintiff would [have been]
 21 required to successfully move for class certification under Rule 23, survive summary judgment, and
 22 receive a favorable verdict capable of withstanding a potential appeal. The risks and costs associated
 23 with class action litigation weigh strongly in favor of settlement.”).

24 Because litigating this case would undoubtedly be complex, including class certification and
 25 potential summary judgment, along with Defendant's vigorous defense as to the merits of Plaintiffs'
 26
 27
 28

1 claims, Plaintiffs faced significant risk in this class action. Additionally, even if Plaintiffs were
 2 successful at trial, the amount of recovery, if any, could be smaller. Furthermore, there is the
 3 possibility Defendant may appeal any adverse judgment, further increasing the risk that Plaintiffs
 4 and Class Members may not recover anything at all. With approximately 396,116 potential
 5 Settlement Class Members, each with the opportunity to file a claim for up to \$2,000 for out-of-
 6 pocket losses and up to \$100 for lost time, total payout to the Settlement Class Members will be
 7 significant.
 8

9 (iv) Procedural Guidance ¶ 1.f-g – The Plan of Allocation and
 10 Claims Process

11 The process of paying Settlement Class Members will be based on claims submitted to the
 12 Claims Administrator indicating their out-of-pocket expenses and lost time related to the Data
 13 Incident. The details of events constituting out-of-pocket expenses and compensable lost time is
 14 detailed in section 2.1 (Expense Reimbursement) of the Settlement Agreement.
 15

16 (v) Procedural Guidance ¶ 1.h – Reversions

17 Payment will be made to Settlement Class Members upon submission of a Valid Claim. The
 18 funds are not being paid out of a “settlement fund.” Therefore, there will not be a revision.
 19

20 (b) **Guidance 2: The Proposed Settlement Administrator**

21 The Parties request the Court authorize the retention of Epiq Systems, Inc (“Claims
 22 Administrator” or “Epiq”) as the Claims Administrator for the Settlement. Epiq is an experienced
 23 claims administration firm and has extensive experience in class actions and on notice issues. Based
 24 on the information obtained from Defendant, Epiq was selected over another administrator that
 25 submitted a bid. Epiq will be paid no more than \$115,000 to fully administer the Settlement in this
 26 case, based on assumptions provided to Epiq in the estimate process. Epiq’s cost and expenses will
 27 not affect the amount paid to the Settlement Class Members.
 28

(c) **Guidance 3: The Proposed Notices to the Settlement Class are Adequate.**

Under the proposed notice plan⁴, outreach to the Settlement Class will be through direct e-mail notice (if emailing is unsuccessful, the Notices will be mailed to Settlement Class Members' physical addresses) and notice on the Settlement Website. That is consistent with this District's Procedural Guidance, which suggests "mail, email, and/or social media as appropriate" and a "settlement website." Procedural Guidance ¶ 3. Defendant shall subpoena Best Buy to obtain (and subsequently provide the Claims Administrator with) the name, email address (where available), and physical address of each Settlement Class Member that Best Buy possesses. Further, consistent with the Procedural Guidance, the Claims Administrator, Epiq is an experienced notice provider and settlement administrator who assisted in preparing the notices—which comply with the Procedural Guidance—providing sufficient information for Settlement Class Members to understand their rights and options, as well as ways to get more information.

(d) **Guidance 4 and 5: Opt-Outs and Objections**

The proposed Class Notice complies with Rule 23(e)(5) in that it discusses the rights the Settlement Class Members have concerning the Settlement. The proposed Class Notice includes information on a Settlement Class Member's right to: (1) request exclusion and the manner for submitting such a request; (2) object to the Settlement, or any aspect thereof, and the manner for filing and serving an objection; and (3) participate in the Settlement and instructions on how to complete and submit a Claim Form to the Settlement Administrator. The Notice also provides contact information for Class Counsel, as well as the postal address for the Court.

(e) **Guidance 6: The Intended Attorneys' Fees and Expenses Request**

⁴ The Declaration of Jessie Mahn in Support of Motion for Preliminary Approval is filed concurrently herewith and outlines the notice program that Epiq will carry out per its duties.

1 Class Counsel will be seeking attorneys' fees and costs up to \$450,000. To-date, Class
 2 Counsel and their respective law firms have devoted approximately 765.5 hours litigating this class
 3 action for a lodestar of \$ 541,445.50. Class Counsels' requested fees and cost are in addition to and
 4 shall not subtracted from settlement amount to the Settlement Class.

5
 6 (f) **Guidance 7: Service Award to Plaintiffs**

7 Class Counsel intends to seek a service award of \$2,000 for each of the Plaintiffs. This
 8 incentive award will not affect or reduce any settlement amount to any member of the Settlement
 9 Class. Plaintiffs actively participated in this litigation by reviewing pleadings; regularly consulting
 10 with Counsel during the progress of this case and remaining informed of the settlement discussions.

11 "Incentive awards are fairly typical in class action cases." *Rodriguez v. West Publishing*
 12 *Corp.*, 563 F.3d 948, 958 (9th Cir. 2009). The requested service awards fall well within the range
 13 authorized by the Ninth Circuit and approved in this District. *Bellinghausen v. Tractor Supply Co.*,
 14 306 F.R.D. 245, 266-67 (N.D. Cal. 2015). "[I]ncentive awards are meant to "compensate class
 15 representatives for work done on behalf of the class, to make up for financial or reputational risk
 16 undertaking in bringing the action, and, sometimes, to recognize their willingness to act as a private
 17 attorney general." *Id.* at 266. "Incentive awards typically range from \$2,000 to \$10,000." *Id.*
 18 (collecting cases). Courts in the Northern District of California have found that a \$2,000 incentive
 19 award is presumptively reasonable. *Wolph v. Acer Am. Corp.*, No. C 09-01314 JSW, 2013 WL
 20 5718440, at *6 (N.D. Cal. Oct. 21, 2013) (ordering a \$2,000 service award for each named plaintiff).
 21

22
 23 (g) **Guidance 8: Cy Pres Awardees**

24 Based on the manner of this Settlement Agreement and the way in which payments will be
 25 made, *Cy Pres* awardees will not be needed in the case.

26 (h) **Guidance 9: Proposed Timeline**

27 Plaintiffs propose the following schedule of final approval consistent with the Settlement
 28

1 Agreement:

2	Deadline	Action
3	[24]7 Provides CAFA Notice required by 28 U.S.C. § 1715(b)	Within 10 days after the filing of this Motion
4		
5	[24]7 to Cause Best Buy to Provide Contact Information for Settlement Class Members	Within 14 days after Entry of Preliminary Approval Order
6		
7		
8	Notice Program Commences	Within 45 days after entry of Preliminary Approval Order
9		
10	Notice Program Concludes	Within 60 days after entry of Preliminary Approval Order
11		
12		
13	Compliance with CAFA Waiting Period under 28 U.S.C. § 1715(d)	90 days after the Appropriate Governmental Officials are Served with CAFA Notice
14		
15	Deadline to file Plaintiffs' Motion for Final Approval of the Settlement Agreement and Motion for Attorneys' Fees, Expenses, and Service Awards	Within 25 days after entry Commencement of Notice program
16		
17		
18		
19	Postmark Deadline for Request for Exclusion (Opt-Out) or Objections	60 days after Commencement of Notice Program
20		
21	Postmark / Filing Deadline for Filing Claims	90 days after Commencement of the Notice Program
22		
23	Deadline for Plaintiffs to File any Response to Objections or Supplement to Motion for Final Approval	No later than 7 days prior to the Final Fairness Hearing
24		
25		
26	Deadline for Claims Administrator to File or Cause to be Filed, if Necessary, a Supplemental Declaration with the Court	At least 5 days prior to the Final Fairness Hearing
27		
28		

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Final Approval Hearing	To be set by the Court at least 100 days after the entry of Preliminary Approval Order and held at the United States District Court for the Northern District of California, 450 Golden Gate Avenue, San Francisco, CA 94102, in Courtroom ____ – ____ Floor and by virtual attendance, details of which to be provided before the Final Approval Hearing on the Settlement Website
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(i) **Guidance 10: Class Action Fairness Act**

Notice will be distributed via email, where valid email addresses as are available. If not, by U.S. mail, where a valid email is not available. Notice will commence by the Claims Administrator within 30 days of a Preliminary Approval Order. § 3.2.

(j) **Guidance 11: Past Distributions**

Pursuant to Section 11 of the Procedural Guidance, Class Counsel submits that the settlements in the following case provide useful comparisons to this Settlement:

	<i>In re Google Plus Profile Litig.</i> , No. 5:18-cv-6164-EJD (VKD) (N.D. Cal.)	
Settlement Funds	\$7,500,000.00	
Number of Class Members	Approximately 10 million	
Number of Class Members to Whom Notice Was Sent	Notice was sent to 161 million U.S.-based Gmail addresses.	
Methods of Notice	Electronic mail	
Claim Forms Submitted (Number and Percentage)	1,820,549	
Average Recovery	To be determined following dismissal of appeal; approximately \$2.50 per class member.	
Amounts Distributed to Cy Pres Recipients	None	
Administrative Costs	To be determined following dismissal of appeal; approximately \$1.5 million.	
Attorneys' Fees and Costs	\$1,844,558.23	

1 **V. Conclusion**

2 Based on the foregoing, Plaintiffs respectfully request that the Court grant preliminary
3 approval of the Settlement Agreement, approval of the proposed notice plain, and schedule the Final
4 Fairness Hearing.

5 DATED: July 1, 2021

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6
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